



# Consultation and Linear Project Permitting

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## Our Firm



- Est. 2005 by former ND Commissioner of Agriculture Sarah Vogel and Beth Angus Baumstark, with a focus on representing farmers, ranchers, and other landowners, including northern plains tribes.
- Now also specialize in landowner representation related to wind, oil, gas, and coal development. We represent only landowners on energy issues.
- Offices in Bismarck and Billings

## My Background



- 2002 Yale Law graduate
- Clerk, Federal Court of Australia, 2002-03
- Founder, Plains Justice
- Taught Natural Resource and Public Health Law, U. of Iowa; Env't'l Law, MSU-B
- Iowa Env't'l Protection Commission, 2009-2010; Iowa Power Fund, 2007-09
- Admitted to practice in Iowa, Montana, and Wyoming

# NHPA Section 106 Tribal Consultation



The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, **take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.** The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.

ACHP are your friends, get to know them.

## NHPA Section 101(d)(6)

- (A) Properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible to inclusion on the National Register.
- (B) In carrying out its responsibilities under section 106 of this Act, **a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties** described in subparagraph (A).

## **36 C.F.R. § 800.2(c)**

### **Consultation should:**



- “commence early in the planning process”
- “be conducted in a sensitive manner respectful of tribal sovereignty”
- Also, “Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes ...

## 36 C.F.R. § 800.2(c)(2)(ii)(C)

BAUMSTARK  
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Partners

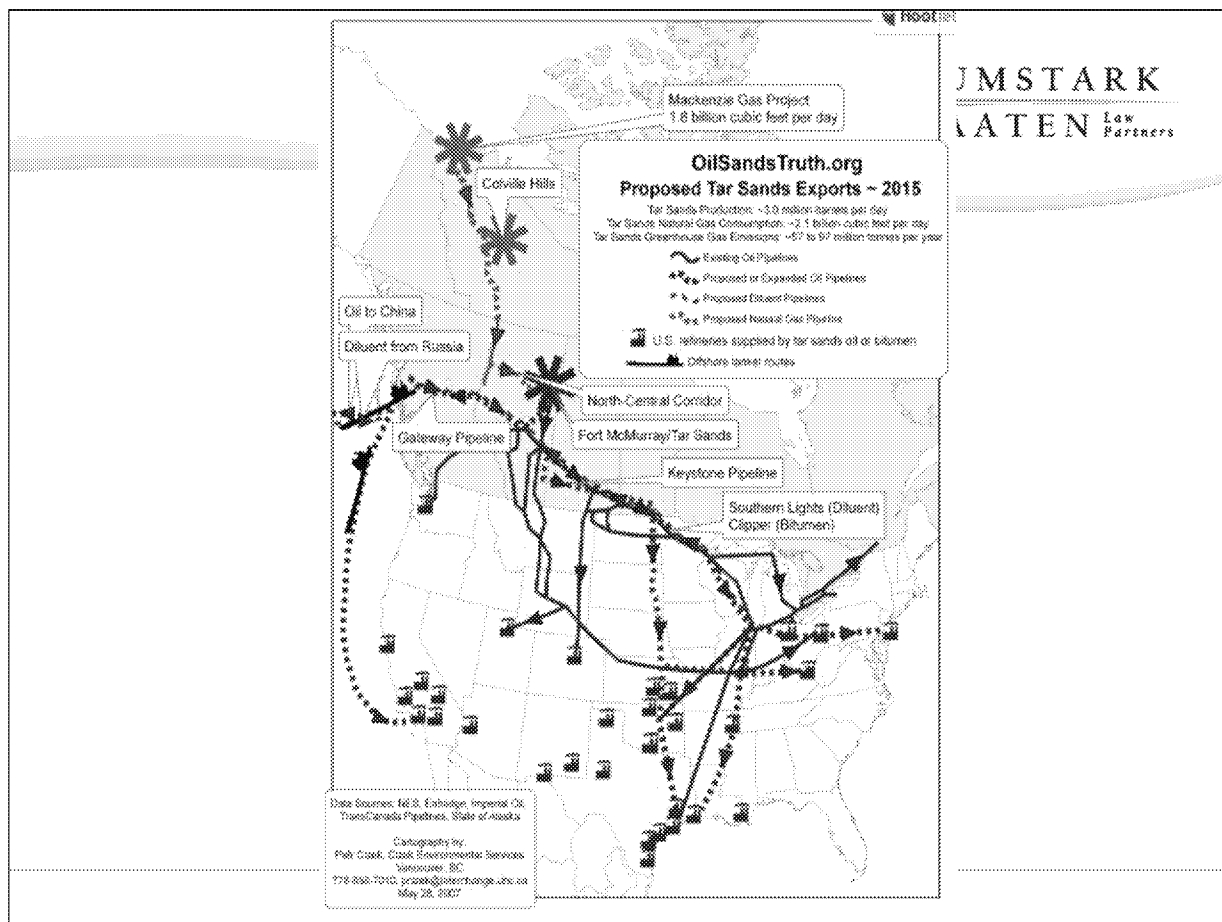
“The consultation requirement is not an empty formality; rather, it ‘must recognize the government-to-government relationship between the Federal Government and Indian tribes’ and is to be ‘conducted in a manner sensitive to the concerns and needs of the Indian tribe.’” *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior*, 755 F.Supp.2d 1104, 1108-9 (S.D. Cal. 2010).

# Initiate Section 106 Process



- Is there a federal action anticipated that may impact properties included on or eligible for inclusion on the National Register of Historic Places?
- If yes, identify the appropriate State and Tribal Historic Preservation Officers for consultation. Notify other affected parties and the public.





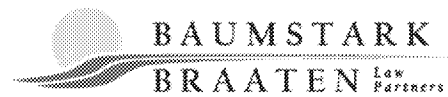
In practice, this can be a daunting task. Who could rattle off just the US tribes – let alone Canadian First Nations – affected in some way by the planned tar sands pipeline system in North America? When the U.S. State Department was reviewing Keystone I and Keystone XL, we went to several tribal councils in the Dakotas to explain what was happening and why it mattered even where it didn't cross reservation land. Large stretches of ancestral homelands with important cultural resources were never fully mapped, in part because the State Department set a schedule that required identification of traditional cultural resources during the winter months. Even where the land wasn't snow-covered, it was not possible for elders to do this sort of identification out in the cold. Very pragmatic considerations can become important in arguing what constitutes reasonable consultation.

# Identify Historic Properties

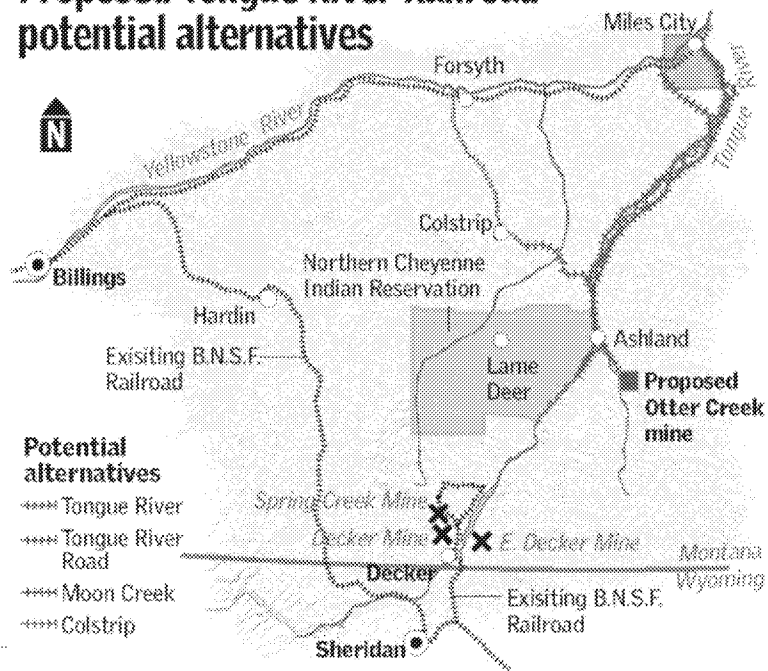


- Determine and document area of potential effects (APE);
- Review existing information
- Seek information from consulting parties
- Gather information from any Indian tribe that may attach religious or cultural significance to properties in the APE; and
- Make a reasonable and good faith effort to identify historic properties in the APE.

# Practicalities of identification



## Proposed Tongue River Railroad potential alternatives



Determine and document area of potential effects (APE);

Review existing information

Seek information from consulting parties

Gather information from any Indian tribe that may attach religious or cultural significance to properties in the APE; and

Make a reasonable and good faith effort to identify historic properties in the APE.

# National Register Bulletin 24



- “Guidelines for Local Surveys: A Basis for Preservation Planning”
- Detailed guidance for surveys used by the National Park Service to identify historic properties. A thorough set of professional guidelines. Often ignored, especially for surveys on private land, where many tribally relevant resources may be.

One important resource neglected at Tongue River: oral history, both white and Indian. The agency's consultants actually seemed to try to keep people with local knowledge distanced from the individuals conducting cultural surveys, as if they were a distraction. Burial sites were missed. No elders were consulted – and Bulletin 24 calls for interview, using translators if necessary. The landowner group I represent has brought in its own archaeologist to conduct a secondary survey and identify flaws and gaps in the agency's work.

# Planning the survey

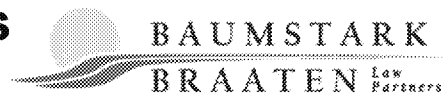


- What area will be covered? To what level of detail? What goals and priorities?
- Who will participate in the survey, what are their qualifications?
- What data will be kept, how will it be handled, who will have access?
- How can the community participate and share their knowledge?

How to avoid a poor process: plan ahead.

But do you really want a good process that will be harder to challenge in court? Yes – a good process yields good information, and information about the value of what might be affected can be very protective. National Register status creates a whole separate standard for avoidance and mitigation.

## Determine how properties may be affected



- Physical destruction of or damage to;
- Alteration inconsistent with Secretary's Standards for the Treatment of Historic Properties;
- Removal of the property from its historic location;
- Change of character of use;
- Introduction of elements that diminish the integrity of significant historic features
- Neglect that causes deterioration

May include but are not limited to (36 CFR 800.5)

## **Reduce or minimize harm**



“The agency official shall consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modification to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties.”

## **Special protection for National Historic Landmarks**



“Section 110(f) ... requires that the agency official, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic Landmark that may be directly and adversely affected by an undertaking.”



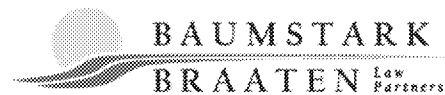
## Standard for meaningful consultation



“BLM’s invitation to ‘consult,’ then, amounted to little more than a general request for the Tribe to gather its own information about all sites within the area and disclose it at public meetings. Because of the lack of information, it was impossible for the Tribe to have been consulted meaningfully as required in applicable regulations.” *Quechan Tribe of Fort Yuma Indian Reservation* at 1118-19.

The court continues: “The documentary evidence also discloses almost no ‘government to government’ consultation. While informational public meetings, consultations with individual tribal members, meetings with government staff or contracted investigators, and written updates are obviously a helpful and necessary part of the process, they don’t amount to the type of ‘government to government’ consultation contemplated by the regulations. This is particularly true because the Tribe’s government’s requests for information and meetings were frequently rebuffed or responses were extremely delayed as BLM-imposed deadlines loomed or passed.

## ACHP review of § 106 compliance



“The Council may provide to the agency official its advisory opinion regarding the substance of any finding, determination or decision or regarding the adequacy of the agency official’s compliance with the procedures of this part. The Council may provide such advice at any time at the request of any individual, agency or organization or on its own initiative. The agency official shall consider the views of the Council in reaching a decision on the matter in question.”

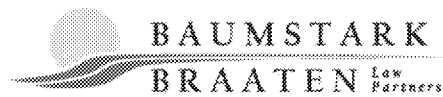
## Dodging Section 106



Tongue River Railroad proposed  
Programmatic Agreement:

**“WHEREAS**, STB’s use of a phased approach for the identification, evaluation, and assessment of effects of historic properties is allowable under 36 C.F.R. § 800.4(b)(2) and 36 C.F.R. § 800.5(a)(3) if memorialized in a Programmatic Agreement (PA) pursuant to 36 C.F.R. § 800.14(b);”

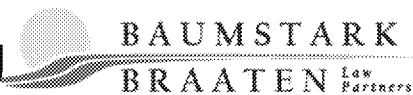
## 36 C.F.R. § 800.4(b)(2)



*Phased identification and evaluation.* Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may ... defer final identification and evaluation of historic properties if it is specifically provided for in a ... programmatic agreement executed pursuant to § 800.14(b)

"As specific aspects or locations of an alternative are refined or access is gained, the agency official shall proceed with the identification and evaluation of historic properties in accordance with paragraphs (b)(1) and (c) of this section.

## **Agency must resolve NHPA issue before issuing a license.**



“The ACHP’s regulations ... permit an agency to defer completion of the NHPA process until after the NEPA process has run its course ..., but require that NHPA issues be resolved by the time that the license is issued. In this case, the Board’s final decision contains a condition requiring DM & E to comply with whatever future mitigation requirements the Board finally arrives at. We do not think that this is the type of measure contemplated by the ACHP when it directed agencies to develop measures to ‘avoid, minimize, or mitigate’ adverse effects.”

*Mid States Coalition for Progress v. Surface Transp. Board*,  
345 F.3d 520, 554 (8<sup>th</sup> Cir. 2003).

## One particularly problematic whereas clause



“WHEREAS, the build alternatives under consideration consist of multiple corridors where access to property is restricted on approximately 50 percent of the combined Area of Potential Effects (APE), as shown in Attachment D (Table 3 and Figure 1), thereby necessitating a phased approach for identification and evaluation of historic properties pursuant to 36 C.F.R. § 800.4(b)(2);”

Attachment D is a Summary of Previously Recorded Cultural Resources and includes no information about survey access granted on each alternative. In other words, Attachment D does not show what the Whereas clause says it does. Also, Attachment D does not provide complete information on previously recorded cultural resources. I had to serve an open records request on Montana SHPO to get that information, which included a National Register eligible property along the Colstrip Alternative that had not been disclosed to the landowners or the tribes.

Also: the 50% access figure is not accurate for the Colstrip Alternative. Because much more access (the landowners estimate over 90%) is available on the Colstrip Alternative, the PA should not apply to that route. The unsubstantiated 50% number may at best be a total for all alternatives, which does not justify a PA for alternatives where far greater access has been granted.

## More whereas clause sneakiness



“WHEREAS, pursuant to 36 C.F.R. § 800.4(b)(2) and 36 C.F.R. § 800.5(a)(3), the STB, through the phased identification, evaluation and effect assessment, has established the likely presence of historic properties and tribal sites of significance within the APE for each alternative or inaccessible area through background research, consultation and the appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the consulting parties;”

Sounds like a lot of admissions in favor of the agency, signed by consulting parties, admissible in court. Stipulations in the rest of the document contain similar unsupported assertions about the agency's process. It all sounds like a clever attempt to get potential parties to litigation to waive issues likely to be raised in a future lawsuit. Don't fall for this sort of thing.

**Second phase analysis  
contemplated *after* approving  
a build alternative**



- After a license issues, the company is authorized to condemn land and commence construction, with conditions.
- Any archaeology and historic preservation after this point will be *salvage archaeology*. Little avoidance is possible. The incentive also looms for the company to hide any new finds to keep construction on schedule and budget.



## Who may challenge NHPA compliance?



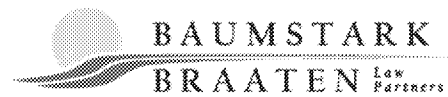
"Plaintiff claims BLM ... failed to consult with Rocky Boys and Fort Belknap Indian Reservations before issuing the leases and the right-of-way. Defendant first argues Youpee [Plaintiff] is a member of the Fort Peck Tribe, not the Rocky Boys or Fort Belknap tribes. In response, Youpee filed an affidavit stating that "The Missouri Breaks is well-documented and officially recognized as a traditional migratory route of my people." Youpee further testifies that BLM's failure to follow the procedures established by NEPA and NHPA have deprived him of his "voice and input." He is right.

*Montana Wilderness Ass'n v. Fry*, 310 F.Supp.2d 1127, 1151 (D.Mont. 2004).

Broad discretion to challenge, not just federally recognized tribes.

"NHPA's regulations require federal agencies to provide interested members of the public reasonable opportunity to participate in the section 470f process. 36 CFR §§ 800.1(a), 800.2(a)(4), (d)(1). Thus, any member of the public who can demonstrate sufficient interest in the preservation of the historical lands at issue falls within the zone of interests protected by the NHPA. Youpee has sufficiently alleged facts supporting his standing under Article III as well as the zone of interests protected by the NHPA."

# Siting Linear Projects



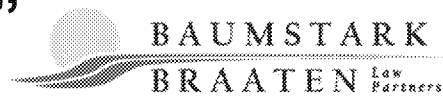
- Transmission lines
- Pipelines
- Railroads
- Roads
- Commonly involves condemnation

## Pipeline example



- Easements for linear projects such as pipelines are commonly negotiated by the surface landowner or allotment holder, or by tribal counsel on tribal lands.
- Never accept the easement agreement offered by the developer, especially as part of a mineral lease. Oil and gas production gives a right to transport only for oil and gas produced on the leased site – not from lands of others.

## Beware the “perpetual” easement



- Timeline for use of the easement should be explicit and date-limited, or you may be stuck with a bad easement for generations.
- Reclamation upon abandonment, on the landowner or allottee's terms.

# Ask Questions



- Is there an appropriate indemnification clause that provides protection against liability in case of a rupture or other incident?
- Does the easement clearly make the company liable for damage caused by its employees and contractors?
- How will the amount of damages be determined?

## More Questions



- Are the surface facilities that the company will construct in addition to the pipeline (pump stations, for example) limited to what is necessary and clearly identified in the easement?
- Is there a distinction between the construction right of way and the permanent right of way for the finished pipeline?

# Keep Asking Questions



- Does the easement limit the number of pipelines the company may construct in the right of way, and if multiple pipelines are allowed, does the easement provide for compensation for each pipeline?
- Does the easement limit and identify the substances that may be carried?
- Does the easement limit the size of the pipeline and the maximum pressure?

## Not Done Yet



- Does the easement provide a maintenance and inspection schedule that notifies the landowner when the company will be on the property?
- Is the proposed depth of the pipeline reasonable in light of the anticipated use of the land for uses other than oil and gas production?



## Easement Questions, continued



- Does the compensation keep pace with inflation and provide for annual payments?
- Is use of the right of way non-exclusive to the grantee, allowing the surface rights owner to continue with its use of the right of way so long as that use does not interfere with the use contemplated by the grantee?

## Other Questions



- Does the easement require the company to maintain the easement area?
- Does the easement define abandonment so that there is a definite date upon which the easement terminates?
- What are the requirements for the company's restoration and reclamation of the easement area?

## Does the easement:



- Identify the permitted routes for ingress and egress to the right of way?
- Restrict company employees' activities to only those necessary?
- Inappropriately require the landowner to provide warranty title?
- Provide for temporary crossings across open trenches and ditches?

No guns, fishing poles, trash, photos?

## Does the company provide:



- Appropriate provisions for pipeline construction quality control and emergency response for the full operational life of the pipeline?
- A legal description of the exact location of the pipeline with an attached map depicting exactly where the pipeline will be constructed?
- Monitoring to ensure compliance with terms?

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# Shameless plug

